

THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Pleading

Judge Ann Aiken granted a plaintiff's motion to amend her complaint to seek punitive damages for Title IX violations as well as a breach of contract claim. The court found that plaintiff adequately alleged that the challenged conduct under the breach of contract claim was tortious in its own right. The court also allowed plaintiff's defamation claim to proceed, finding that speech taken in retaliation and in violation of federal law is not protected under the First Amendment. Bird v. Lewis & Clark College, CV 98-691-AA (Order, July 23, 1999 - 3 pages).

Plaintiff's Counsel: Charles Denkers
Defense Counsel: David Ernst

Employment

A former police officer with the City of Salem filed an action against the City claiming that he was discriminated against on the basis of a disability in violation of federal and state statutes. Plaintiff also asserted a claim for common law wrongful discharge.

Judge Ann Aiken granted a defense motion to dismiss all claims

brought under Title II of the ADA on the basis that Title II is inapplicable to employment. The court denied defense motions to strike the punitive damage claim and to dismiss the common law wrongful discharge claim. The court explained that in the absence of authority tending to show that federal or state statutes intended to supplant common law remedies, such a claim could stand. Fultz v. City of Salem, CV 99-399-AA (Order, July 20, 1999- 4 pages).

Plaintiff's Counsel: Charles Denkers
Defense Counsel: David Ernst

Habeas

A state criminal defendant convicted of first degree assault and attempted murder filed a federal post-conviction petition claiming that he received ineffective assistance of counsel. The petitioner was involved in a dispute and altercation during a card game and stabbed a fellow player. Petitioner claimed that he acted in self-defense while four prosecution witnesses claimed that the petitioner acted without provocation. All of the witnesses and participants were drunk at the time of the event. Petitioner

waived a jury trial and was convicted by the trial judge following factual findings that the petitioner lacked credibility compared to the other witnesses. Petitioner failed to file an appeal, but did file a state post-conviction petition. The trial court dismissed the opinion and granted the state's motion for summary judgment without opinion or hearing. The Court of Appeals affirmed without opinion and the Oregon Supreme Court declined review.

Before addressing the merits, Judge Ann Aiken noted that the AEDPA applied and therefore, she first had to determine the appropriate standard of review. Judge Aiken held that the state post-conviction court's grant of summary judgment constituted a ruling on the merits and thus, ordinarily a deferential standard of review should apply. However, because the state post-conviction courts failed to provide any explanation for the result, that deferential standard had to give way to a full review of the merits. Judge Aiken explained that application of the violation of clearly established federal law standard was impossible for such a "post card denial." On the merits, the court found that petitioner failed to show any prejudice from his

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counsel's alleged errors and on that basis, relief was denied. Cortez v. Johnson, CV 97-1324-AA (Opinion, June, 1999 - 12 pages).

Petitioner's Counsel: Ellen Pitcher
Defense Counsel: Lynn Larson

Employment

Plaintiff, a 51-year-old woman, was discharged by defendant for insubordination and on-going performance deficiencies. She had been a sales representative for the company for over twenty years. During her last week of employment, plaintiff refused to meet with company management unless she was allowed to tape record the meeting or have a nonmanagement employee attend as a witness. Plaintiff was discharged a few days later after continuing to refuse to meet without these conditions being met.

Defendant contended that plaintiff failed to make a *prima facie* case in her age discrimination claim because she was not performing the job in a satisfactory manner. Judge King did not have to determine whether plaintiff met this prong of the McDonnell Douglas presumption because he concluded that there was direct evidence of discriminatory intent in a comment made by a member of the management team, within two months of plaintiff's discharge, that the problem with plaintiff was her age and that she needed to move on. The comment, which also

created a factual issue that the stated reasons for the discharge were a pretext, was not a stray remark due to its proximity to plaintiff's discharge and its direct reference to her age being the reason that she should leave the company's employ. Summary judgment was denied. Moore v. TEK Chemical, Inc., CV98-680-KI, Opinion and Order, July 30, 1999.

Plaintiff's attorneys: John Heald, Stephen Madkour
Defense attorneys: Kim Melville, Lisa Rackner, Glen McClendon

Criminal Law

Judge Ann Aiken granted a defense motion to suppress evidence and statements that were elicited in violation of the Fourth Amendment. The defendant was arrested in part of a bus interdiction program in Klamath Falls. A local citizen who owned a restaurant tipped police officers to the fact that a particular bus line that regularly stopped at his restaurant had some "suspicious" passengers based upon the frequency of their travel from Los Angeles to Yakima, Washington. Police decided to stop one of the buses on its scheduled stop at the citizen's restaurant and during a search they discovered a large quantity of cocaine and marijuana. This seizure led to a bus interdiction program that included 15-20 stops and 9 drug seizures.

The defendant was the passenger on one of the buses targeted by the

police. Once the bus arrived at the citizen's restaurant, 3 police officers boarded the bus and asked everyone on the bus to consent to a search of their luggage.

Passengers were asked to raise their hands if they agreed. Several officers stood outside of the bus.

Judge Aiken rejected the defendant's argument that the search was unlawful under the Equal Protection Clause because the police had targeted a bus line generally known to cater almost exclusively to the Hispanic community. Judge Aiken found that law enforcement offered legitimate, non-discriminatory reasons for the bus interdiction program. However, the court held that given the totality of the circumstances, a reasonable person would not have felt free to leave the bus, nor would a reasonable person have felt that they could decline consent. The court specifically found that the fact that the officers failed to advise passengers of their right to leave was a relevant factor in the case because the bus was stopped during a regularly scheduled meal break. In the absence of any reasonable suspicion or probable cause that any passenger was about to or had engaged in any unlawful activity, the court held that the lawfulness of the seizure rested upon the voluntariness of the consent.

The court also rejected the government's argument that the defendant had abandoned her bag when she refused to claim it in response to a police directive to do so. Defendant's statements and

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further evidence seized from her purse were suppressed under the fruit of the poisonous tree doctrine. United States v. Cuevas-Ceja, CR 98-61047-AA (Opinion, May, 1999).

AUSA: William Fitzgerald
Defense Counsel: Bryan Lessley

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